MALAYSIAN REPORTS

Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-166-1991
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED AZMI AND GUNN CHIT TUAN SCJJ
19 SEPTEMBER 1991

Civil Procedure — Summary judgment — Joint venture project for setting up paper mill — Provision for reference of all disputes, differences and questions which may arise at any time to arbitration — Action brought by appellant against respondent — Application for summary judgment — Application by respondent for an order of stay in accordance with arbitration agreement — Discretion of court — Arbitration Act 1950, s 6

Arbitration — Referring dispute to arbitration — Provision in joint venture agreement to refer all disputes, differences and questions which may arise at any time to arbitration — Summary judgment application brought by appellant — Application by respondent for an order of stay in accordance with arbitration agreement — Discretion of court to grant stay — Arbitration Act 1950, s 6

In this case the parties had entered into a joint venture project for the setting up of a mill for the manufacture of high quality security paper. There were delays in carrying out the project and the appellants brought an action for the return of land titles and retransfer of land and for damages for breach of contract. The appellants applied for summary judgment. The respondent took out a summons-in-chambers and, relying on an arbitration clause in the agreements, applied for an order of stay pursuant to s 6 of the Arbitration Act 1950. The learned trial judge held that there were triable issues in the case and on the arbitration clause he held the court was bound to act on the arbitration agreement. The appellant appealed.

Held, dismissing the appeal:

(1) Once it is established that there has arisen a dispute or difference or question, as provided in the arbitration agreement, the language of s 6 of the Arbitration Act 1950 places on the plaintiff the burden to show that it ought not to be referred to arbitration. The fact that there is apparent weakness in the respondent's case should not be taken as an excuse to brush aside an arbitration clause to which the appellant was a party and which was being insisted on by the respondent.

(2) Once the party asking for a stay has satisfied the court that there is a dispute, difference or question between the parties within the meaning of the arbitration clause, then it is a question of exercising the discretion to grant or not to grant the stay. If the appellate court is satisfied that the discretion was properly exercised, the order granted should not be disturbed.

(3) In this case as the discretion has been exercised judicially and according to the proper principles of law, the appeal should be dismissed. The learned judge having found that there were triable issues should have dismissed the application for summary judgment.

[Bahasa Malaysia summary

Di dalam kes ini pihak-pihaknya telah mengadakan projek usahasama untuk mendirikan kilang untuk membuat kertas keselamatan mutu tinggi. Telah terdapat kelengahan di dalam menjalankan projek itu dan perayu telah membuat tuntutan untuk mendapat balik suratmilik tanah dan pindahbalik tanah dan juga gantirugi kerana kemungkiran kontrak. Perayu telah memohon mendapat penghakiman terus. Responden telah mengeluarkan saman dalam kamar dan, bergantung kepada fasal timbangtara di dalam perjanjian mereka, ia telah memohon mendapat penggantungan kes mengikut s 6 Akta Timbangtara 1950. Hakim yang arif berpendapat terdapat isu yang perlu dibicarakan dan memandangkan fasal timbangtara itu beliau berpendapat mahkamah terpaksa bertindak mengikut perjanjian timbangtara itu. Perayu telah merayu.

Diputuskan, menolak rayuan itu:

(1) Apabila dibuktikan bahawa telah timbul pertikaian, perbalahan atau soal, seperti yang disebut di dalam perjanjian timbangtara, peruntukan s 6 Akta Timbangtara 1950 meletakkan ke atas plaintif beban menunjukkan bahawa perkara itu tidak harus dirujukkan untuk timbangtara. Fakta bahawa terdapat kecacatan yang nyata di dalam kes responden tidak boleh digunakan sebagai alasan mengetepikan fasal timbangtara yang mana telah dipersetujui oleh perayu dan perlaksanaannya didesak oleh responden.

(2) Apabila pihak yang memohon penggantungan telah membuktikan kepada mahkamah bahawa terdapat pertikaian, perbalahan atau soal antara pihak-pihak itu seperti yang disebut di dalam fasal timbangtara, maka terpulanglah kepada mahkamah menjalankan budibicara membenarkan penggantungan itu atau tidak. Jika mahkamah rayuan berpuashati bahawa budibicara itu telah dijalankan dengan betul, perintah yang dibuat tidak patut diubah.

(3) Di dalam kes ini oleh kerana budibicara telah dijalankan dengan adil dan mengikut prinsip-prinsip undang-undang yang sempurna, rayuan hendaklah ditolak. Hakim yang arif telah berpendapat bahawa terdapat isu yang harus dibicarakan dan beliau seharusnya menolak permohonan untuk mendapat penghakiman terus.]

Cases referred to

1 *Scott* v *Avery* (1856) 5 HLC 811; 10 ER 1121 (refd)
2 *Associated Bulk Carriers* v *Koch Shipping Inc; 'The Fuohsan Maru'* [1978] 1 Lloyds Rep; [1978] 2 All ER 254 (refd)
3 *Willesford* v *Watson* (1873) LR 8 Ch 473 (refd)
4 *'The Evje'* [1974] 2 Lloyd's Rep 57; [1975] AC 797 (refd)
5 *Co-operative Central Bank Ltd* v *Haji Rosli bin Haji Kamaruddin* [1991] 2 MLJ 37 (refd)
6 *M Arulandan* v *Malaysian Co-operative Insurance Society Ltd* [1987] 1 MLJ 485 (refd)
7 *Professor Dr A Kahar Bador & Ors* v *N Krishnan & Ors* [1983] 1 MLJ 412 (refd)
8 *Gujarat State Co-operative Land Development Ltd* v *PR Mankad & Anor* AIR 1979 SC 1203 (refd)
9 *London and North Western and Great Western Joint Railway Companies* v *JH Billington Ltd* [1899] AC 79 (refd)

Legislation referred to

Arbitration Act 1950 s 6

Appeal from: Civil Suit No 22-30-1990 (High Court, Ipoh)

WSW Davidson for the appellant.
Ranjit Singh (*JS Olikh* with him) for the respondent.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): Amidst considerable fanfare

(borrowing the words of the learned judge, Peh Swee Chin J) what was called an Asean project (a mill for the manufacture of high quality security paper) was launched in early 1987 in the state of Perak. This so-called Asean project was actually grounded on two written agreements between the Perbadanan Kemajuan Negeri Perak, that is the State Development Corporation established under the Perak State Development Corporation Enactment 1967 (the appellant) and a company named Asean Security Paper Mill Sdn Bhd (the respondent).

The two agreements were executed by the parties on 16 January 1987. One was the sale and purchase agreement and the other is a supplementary agreement of the same date called the use of land agreement. By virtue of the sale and purchase agreement, the appellant agreed to sell and the respondent agreed to purchase certain pieces of land in the mukim of Lumut in the state of Perak.

The learned judge set out what he considered as the essential contents of the two agreements in his grounds of decision as follows:

> By an agreement made on 16 January 1987 the plaintiff agreed to sell and the defendant agreed to purchase the said lands for the price of $3,844,954.08 out of which a sum of $158,673.05, being deposit, was paid in a certain manner with the balance in the sum of $3,646,281.03 to be paid or satisfied by the issue by the defendant to the plaintiff of 5% cumulative participating preference shares in the defendant, credited as fully paid up and redeemable on certain terms.
>
> Inter alia, the defendant agreed to erect, complete and commission the paper mill by 31 January 1990.
>
> By a supplementary agreement of even date, inter alia, both parties reaffirmed the date of 31 January 1990 aforesaid, and stipulated for the delay on grounds of fire, acts of war etc which would be permitted by compensating extension of time. The relevant ground in this case for the delay was a fire which took place subsequently.

In our view there are also other provisions in both the agreements which are material for the purpose of this appeal. For example, cl 6.1 and 6.2 of the sale and purchase agreement and cll 1, 2 and 3 of the use of land agreement.

For convenience cl 6.1 and 6.2 of the sale and purchase agreement are reproduced below:

> 6.1 PKNP shall use their best endeavours to assist the company in the following matters:
>
> (a) the use by the company of all access roads for the industrial estate to the land that the Perak state government or PKNP has control over and ensuring the proper maintenance of the said roads by the appropriate authorities;
>
> (b) the procurement from the Lembaga Letrik Negara of a minimum electricity supply of six megawatts at eleven kilo-volts to the paper mill on the mill-site before 31 March 1987 and also the procurement of a preferential tariff in respect of the said electricity supply to the best possible terms;
>
> (c) the procurement from the Jabatan Bekalan Air of a minimum supply of one thousand and five hundred (1,500) cubic metres of water before 31 March 1987 and also the procurement of a preferential tariff in respect of the said water supply to the best possible terms;
>
> (d) the appeal to the appropriate authority for the reduction of the quit rent in respect of the land to the best possible terms;
>
> (e) the appeal to the appropriate authority within nine (9) months from date hereof for the removal of the restriction in interest clause in the individual issue documents of title to the land, whereby the Perak Menteri Besar's consent is presently required for the transfer or sub-lease of the land.
>
> (f) the procurement by the company from the Department of Immigration a reasonable number of work passes and immigration clearance for the entry into and exit from the state of Perak of workers and staff which the company may require for the construction, installation, commissioning and efficient management of the project mill.
>
> 6.2 PKNP shall treat the erection, completion and commissioning of the project mill as a PRIORITY project and shall generally assist the company in obtaining the necessary approvals from the appropriate authorities for the electricity and water supplies and other necessary facilities.

Clauses 1, 2 and 3 of the use of land agreement read as follows:

> 1 The company covenants and agrees that subject to clause 2 below it will at its own expense erect, complete and commission the project mill by 31 January 1990.
>
> 2 If the erection, completion or commissioning of the project mill is delayed as a result of any failure on the part of PKNP to fulfil any of its obligations under the sale and purchase agreement or as a result of any strikes, lock-outs, fire, lightning, explosion, flooding, riots, civil commotions, acts of war, malicious mischief or theft, the company shall be entitled to such reasonable extension of the said period as may be required to compensate for the said delay.
>
> 3 If the company fails to comply with its said obligations within the period stipulated in clause 1 with such extension as the company may be entitled to claim under clause 2 above, PKNP shall have the right in its absolute discretion to declare the company in default of this agreement, whereupon the sale and purchase agreement shall become null and void and of no further effect. In such event the sum referred to in recital 1(a) above shall be absolutely forfeited to PKNP by way of liquidated damages, and the company shall forthwith retransfer the land to PKNP free from all charges and encumbrances at the company's own cost and expense if the transfer by PKNP to the company has already been completed.

One feature which stands out in the provisions reproduced above is that despite the ultimate right of the appellant to declare default, the project was a sort of

joint venture project in the sense that the appellant under the caption 'obligations of PKNP' was also given the responsibility to assist the respondent in a number of important matters like assisting the respondent in procuring the right water and electricity facilities from the relevant government or statutory agencies.

In addition, cl 10 of the sale and purchase agreement vests on the appellant the sole responsibility of evicting squatters from the land.

Looking at the provisions of the agreements reproduced there was certainly a mutuality of interest between the parties and there were contractual liabilities on both the appellant and the respondent to make the project a success.

An arbitration provision is contained in cl 13 of the sale and purchase agreement and cl 5 of the use of land agreement. The arbitration clauses are identically worded as follows:

> All disputes, differences and questions which may at any time arise between the parties hereto or their respective representatives or assigns touching or arising out of or in respect of this agreement or the subject matter thereof shall be referred to a single arbitrator. In case the parties cannot agree upon a single arbitrator then two arbitrators will be appointed one to be appointed by each party to the agreement in accordance with and subject to the provision of the law relating to arbitration in Malaysia as may be in force from time to time.

As far as can be ascertained from the affidavits filed there was a relative silence between the parties after the launching of the project although there is some evidence that preliminary works were being undertaken by the respondent. Despite the fact as stated earlier that the project should be regarded as a sort of joint project between the appellant and the respondent, the appellant became agitated with the apparent inaction of the respondent and as the dateline was approaching nearer and nearer, letters from the appellant to the respondent became more and more urgent and threatening. The following extract of a letter from the solicitors of the appellant to the solicitors of the respondent dated 7 December 1988 reflects what appears to be a strained relationship between the partners of the project during the material period:

> Delay in completion of the project mill
>
> 9 Your clients are under a contractual duty to complete and commission the project mill by 31 January 1990. The letter from Whitefield Technical Services Ltd dated 25 July 1988 appears to be clear confirmation that start up of the project can only be by the end of 1990 and not earlier. Accordingly, the press statement to the effect that the mill would be operative 'as scheduled' by 1991 is not accurate.
>
> 10 We are fully aware of the fact that clause 2 of the use of land agreement contains a provision for extension of time for completion of the mill in certain situations. If your clients are of the view that they are entitled to any extension of time under this clause, they would be well advised to put up a formal application to our clients for the required extension with supporting documentation rather than to assume that the date has been extended.

There was no reply to this letter. Two more letters were also sent. As time went on the situation did not improve and on 2 October 1989 the solicitors for the appellant wrote to the solicitors of the respondent indicating their intention to declare default under cl 3 of the use of land agreement and also under the sale and purchase agreement. They wrote:

> 1 We refer to our letters to you dated 7 December 1988, 28 January 1989 and 23 March 1989 to which we have not received any reply. Copies of these letters are enclosed for your convenience.
> 2 We have been instructed to once again draw your attention to the provisions of clause 1 of the use of land agreement and clause 5 of the sale and purchase agreement, both of which require that your client should erect complete and commission the project mill by 31 January 1990.
> 3 As at date hereof it appears that your clients have not even commenced construction of the project mill.
> 4 Our clients have instructed us to notify you that they require your clients to strictly comply with this provision, and that it is our clients' intention to take action to declare your clients in default under clause 3 of the use of land agreement, and also under the sale and purchase agreement on 1 February 1990, unless the project mill has been satisfactorily completed and commissioned by that date or your clients have before that date shown cause to the contrary to our clients' satisfaction.
> 5 Please acknowledge receipt of this letter.

On 1 February 1990, that is the very day following the dateline provided in cl 1 of the use of land agreement, the appellant took out a writ asking four an order of the court for the respondent to return to the appellant 11 land titles as well as the memorandum of transfer executed by the appellant and also for an order to retransfer four land titles to the appellant and for the discharge of the two charges given to Public Bank Bhd with respect to the said titles. The writ also sought alternatively for damages for breach of contract.

The statement of claim alluded to the two agreements referred to earlier and stated that to date the respondent had transferred four land titles to its name and two of which were charged to Public Bank Bhd and a further 11 land titles were still in the possession of the respondent. The statement of claim also referred to the show cause letter sent by the solicitors of the appellant to the respondent on 2 October 1989 as to why the agreements should not be terminated since the respondent had failed to erect, complete and commission the project mill by the dateline, 31 January 1990. It was finally alleged in the statement of claim that the failure of the respondent to offer an explanation for the delay or to request for extension of time had left the appellant

with no alternative but to terminate the said agreements.

On 19 February 1990 the appellant took out a summons-in-chambers for summary judgment under O 81 of the Rules of the High Court 1980. On 29 June 1990 the respondent took out a summons-in-chambers for an order of stay pursuant to s 6 of the Arbitration Act 1950 ('the Act'). Both these summonses-in-chambers were finally heard together on 20 August 1990.

At the outset it may be observed that the learned judge had to deal with two applications which actually required him to apply different formal criteria. The criteria for the grant of summary judgment and for the grant of a stay are not the same.

The practice normally followed is that if a claimant believes that a defendant has nothing to defend and cannot fend off the judgment he may apply for summary judgment. However, the enforcement of an arbitration clause would depend at the very outset on the wording of the arbitration clause itself.

A defendant on his part when facing similar application can either put up a plausible defence or obtain a stay by relying on an arbitration clause. In this case the appellant in the application for summary judgment believed that the respondent had no answer to the claim because the answer did not amount to a genuine dispute or difference.

It is a well-settled principle of law that parties cannot by contract oust the jurisdiction of the courts but parties may, by contract, covenant that no right of action will accrue until a third person (the arbitrator) has decided on any difference which may arise between the parties — *Scott* v *Avery*.[1] But the arbitration clause we have with us here is not a *Scott* v *Avery*[1] clause in that sense. The only principle involved in the present case is what is the court's attitude to an arbitration clause of the nature that appears in the two agreements reproduced earlier.

It is also a well-settled principle that where parties have agreed to refer disputes for arbitration and the court is satisfied that a dispute exists, but one of the parties to the contract commences an action to have the matter determined by the court the prima facie stand of the court is to stay the action and allow the parties to go to the tribunal to which they have agreed. In other words once the party applies for a stay and there is a dispute within the meaning of a valid and subsisting arbitration clause the inclination of the court is that effect should be given to the arbitration clause.

However, what the appellant here is saying is that the arbitration clause does not arise because what the respondent is saying now does not amount to a genuine dispute or difference within the meaning of the arbitration clause.

Section 6 of the Act reads:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

Although the language of s 6 of the Act is not wholly identical with the language of s 4(1) of the corresponding English Act the material words are identical, namely, 'in respect of any matter agreed to be referred to arbitration' and 'if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement', and that the applicant was at the time when the proceedings were commenced and 'still remains ready and willing to do all things necessary to the proper conduct of the arbitration'. They constitute the necessary conditions before an order of stay is granted. All the conditions to be fulfilled for an order of stay are set out in paras 560-565 of 2 *Halsbury's Laws of England* (4th Ed).

In an application pursuant to s 6 of the Act, the court had a discretion whether or not to grant stay. Lord Denning in his dissenting judgment in '*The Fuohsan Maru*'[2] observed that unlike the English Arbitration Act 1975 which does not apply to domestic arbitration agreements but only to international arbitration agreements, under the English 1950 Act the courts have a discretion whether to grant a stay or not.

The language of s 6 of the Act is such that if the party which opposes the application for stay can show sufficient reason why the matter should not go to arbitration, the court should not normally grant stay. It is of course the court which must be satisfied that there is sufficient reason for the arbitration provision not to be complied with.

The learned judge in this case would appear to have approached the task before him by considering the appellant's contention that there was no triable issue.

After examining the affidavits filed the learned judge found the issues of facts to be still in dispute and therefore concluded that the matter should clearly be left to be tried. On the arbitration clause the learned judge concluded that the plaintiff, being party to the agree-

ment, cannot now choose not to be governed by the arbitration clause if the other party seeks to enforce the arbitration clause. It was, he said, the prima facie duty of the court to act on the agreement, citing Selbourne LC in *Willesford* v *Watson*:[3]

> If parties choose to determine for themselves that they will have a domestic forum instead of resorting to ordinary courts, then, ... a prima facie duty is cast upon the courts to act on such agreement.

Based on materials available the conclusion of the learned judge on the triable issues is in our view completely justified.

The language used in the arbitration clause in our case is very wide. It covers 'all disputes, differences and questions' which may rise 'at any time' 'touching or arising out of or in respect of' the contract between the parties and they 'shall be referred' to arbitration. We do not think the arbitration clause can be misunderstood as to what the actual intention of the parties is, that is the parties had agreed to go to arbitration to settle any dispute, difference or question.

In *'The Evje'*[4] the arbitration clause there also provided that all disputes from time to time arising out of the contract shall be referred to arbitration. The words 'arising out of' became an issue of interpretation.

Viscount Dilhorne said at p 66:

> In *Heyman* v *Darwins Ltd* [1942] AC 356 Lord Porter said that the words 'arising out of a contract' have a wider meaning than the words 'under a contract,' a view which was repeated by Lord Justice Sellers in *Government of Gibraltar* v *Kenney* [1956] 2 QB 410. Although the words are different, I must confess my inability to 'discern any difference in their content'.

In *Co-operative Central Bank Ltd* v *Haji Rosli bin Haji Kamaruddin*[5] this court had to be satisfied as to the meaning of the word 'dispute' to see whether the matter before the court was a dispute 'touching the business of the appellant' and therefore fell to be settled in accordance with the provisions of s 49(1) of the Co-operative Societies Act 1948. In the course of its judgment this court adverted to *Arulandan* v *Malaysian Co-operative Insurance Society Ltd*[6] and *Professor Dr A Kahar Bador & Ors* v *N Krishnan & Ors*[7] which held that the words 'dispute touching the business of the co-operative society' must be given a wider interpretation. But as to what the meaning of the word 'dispute' is, *Gujarat State Co-operative Land Development Ltd* v *PR Mankad & Anor*[8] was followed in which the word 'dispute' was defined in the following terms:

> The term 'dispute' means a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other.

The arbitration clause in our case as emphasized earlier is very wide and does not only speak of *all disputes* but also *all differences and questions* which may arise not at any specific time but *at any time*.

It was the appellant's contention that the dispute or difference was never raised before the issue of the writ. On a proper appreciation of the background this cannot be true. It may not have been raised by the respondent but there is ample evidence it was raised in the various correspondences of the contractors of the respondent. For example, there was the squatter problem which must surely be within the knowledge of the appellant since vacant possession was given only after a delay of one year. Looking at the affidavits filed, the squatter problem would seem to have prevented the study of the soil on the land and this fact was consistently reflected in the correspondences exhibited. On 4 June 1987, about six months after the signing of the agreements, Malata Engineering Consultants Sdn Bhd wrote to the respondent complaining of their inability to conduct site investigation to commence building works because of the presence of squatters on the land. On 6 November 1987, the same consultants again wrote to the respondent with the same complaint. Vacant possession was given to the respondent only on 1 December 1987. It was contended by the respondent that the delay in giving vacant possession was the cause of the inability to carry out exhaustive soil test by the consultants and until the soil test could be completed the plans could not be approved. That seems to us to be a fair contention, at this stage at least. A proper conclusion can only be arrived at after a full hearing.

Apart from the delay of one year in granting vacant possession, there was also the question of the appellant's responsibility to arrange for approval of the plans and electricity supply. It can be observed from the correspondence that the respondent made the necessary application for electricity supply to the Lembaga Letrik Negara as early as 18 January 1988 after vacant possession was granted on 1 December 1987.

London and North Western and Great Western Joint Railway Companies v *JH Billington Ltd*[9] was cited on behalf of the appellant to support their contention that a dispute must be raised by the respondent before the issue of the writ. In *Billington*,[9] action was brought to recover a certain sum of money as charge for services rendered by the railway company. A Railway Act empowering the company to make the charge also enacted that any difference arising under the statutory provision shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party. The respondents gave notice to defend the action on the ground that the county court had no jurisdiction to decide the matter as jurisdiction was ousted by the statute referred to. Earl of Halsbury LC said at p 81:

> I propose to give no opinion upon the true construction of the statute, except this: that a condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have arisen; and I think that must mean a difference of opinion before the action is launched either by formal plaint in the county court or by writ in the superior courts.

In our view the absence of a developed or fully blown dispute or difference at the date of the issue of the writ, is not a ground for refusing stay, if the court finds there is a dispute or difference, for to hold otherwise would encourage a claimant who was subject to an arbitration agreement but who did not wish to go to arbitration, to rush to court at an early stage in order to defeat the arbitration agreement.

Once it is established that there has arisen a dispute or difference or question, the language of s 6 of the Act places on the plaintiff the burden to show that it ought not to be referred to arbitration. As correctly stated by the learned judge, the fact that there is apparent weakness in the respondent's case should not be taken as an excuse to brush aside an arbitration clause to which the appellant was a party and which was being insisted on by the respondent.

Much has been said about the silence of the respondent and the failure to respond to the letters of the solicitors of the appellant addressed to the solicitors of the respondent. In our view the special relationship between the appellant and the respondent as envisaged in the provisions of the agreement reproduced earlier in the judgment, which provisions imposed on the appellant also to the duty to ensure the success of the project, destroys the effectiveness of the averments on the failure of the respondent to respond to the letters and the failure to apply for extension of time.

To summarize, once the party asking for the stay has satisfied the court that there is a dispute, difference or question between the parties within the meaning of the arbitration clause, then it is a question of exercising the discretion to grant or not to grant the stay. This discretion of the court must of course be exercised judicially and exercised according to the proper principles of law. If the appellate court is satisfied that the discretion was properly exercised, the order granted should not be disturbed.

Accordingly we dismiss the appeal with costs.

We wish to make one observation. It is regrettable that contractual provisions for arbitration can sometimes be abused. We wish to emphasize that surely it is not the intention of s 6 of the Act to confer on a defendant the privilege of delaying proceeding to enable him to put off the day of judgment indefinitely. It should be the duty of everyone involved to see that the matter be expeditiously resolved.

The learned judge in his grounds of decision has clearly expressed his view that there are triable issues and the application for summary judgment could not be entertained. He should then have dismissed the application for summary judgment. The order of stay is upheld. Deposit to respondent to account of taxed costs.

Appeal dismissed.

Solicitors: *Azman Davidson & Co; Ranjit Singh & Co.*

Reported by *Prof Ahmad Ibrahim*

Shamsuddin bin Hassan & Anor v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-25-91
JEMURI SERJAN CJ (BORNEO), HARUN HASHIM AND MOHAMED YUSOFF SCJJ
11 SEPTEMBER 1991

Evidence — Chain of evidence — Exhibits — Charge of trafficking in dangerous drugs — Serious gaps in chain of evidence with regard to exhibits — No evidence of common intention — Conviction set aside — Penal Code (FMS Cap 45), s 34 — Dangerous Drugs Act 1952, s 39B(2)

Criminal Law — Common intention — Evidence of common intention essential — Penal Code (FMS Cap 45), s 34

In this case the appellants appealed against their conviction on a joint charge of trafficking in cannabis, an offence under s 39B(1) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the Act read with s 34 of the Penal Code (FMS Cap 45) ('the Code'). The prosecution evidence was that, as a result of information received, the police on 7 March 1986 followed a Ford car from which they later saw a bundle thrown out of the left window. A policeman stopped his car and picked up the bundle. The other police cars continued to follow the Ford car which later stopped after it met with an accident. The police found the two appellants, who were husband and wife, in the car and also a 15-month-old child in the arms of the mother, the second appellant. The policeman, PW4, who picked up the bundle and the drugs, returned to the Changkat Jering Police Station where he waited for further orders. The other officers returned to Kuala Kangsar Police Station where they arrived at 1pm. Later, PW4 returned to the Kuala Kangsar Police Station arriving at 5pm. PW4 handed over the bundle and the drugs to the investigation officer at 6pm. The investigation officer handed over the drugs to the chemist for examination on 12 March 1986. The drugs that were handed over to the chemist were not marked until it was packed six days after the investigation officer received it from PW4. There was no explanation of what PW4 did with the drugs for more than five hours before he handed it over to the investigation officer.

Held, allowing the appeal:

(1) There were serious gaps in the chain of evidence with regard to the drugs thrown out of the car and the exhibits produced in court. On this ground alone, the appellants should not have been called up to enter on their defence.